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Office of Administrative Law Judges
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Issue Date: 21 March 2006

Case No. 2003-BLA-5601

BRB No: 04-0838 BLA

In the Matter of:

CARLOS COOTS,
Claimant,

v.

BLEDSOE COAL CORP.,
Employer,

and

JAMES RIVER COAL CO.,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES (On Brief):

Edmond Collett, Esq.
For the claimant

James M. Kennedy, Esq.
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION ON REMAND-DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act"). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a)(2001).

On June 22, 2004, a Decision and Order was issued denying benefits to Claimant due to his failure to establish pneumoconiosis. Claimant then appealed to the Benefits Review Board, who on August 12, 2005, vacated the findings under Section 718.202(a)(4) and the denial of benefits. BRB No. 04-0838 BLA (August 12, 2005)(unpub.). The Board remanded the claim for reconsideration based on the evidentiary limitations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, Claimant, and Employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

Procedural History

Claimant filed his application for benefits on February 16, 2001. (DX 2). The District Director denied his claim on August 15, 2002. (DX 31). Claimant requested a formal hearing and the claim was transferred to the Office of Administrative Law Judges. (DX 36). A Decision and Order Denying Benefits was issued on June 22, 2004. Claimant appealed to the Benefits Review Board, which vacated and remanded the decision on August 12, 2005. I now address that decision.

Issues on Remand

The issues on remand are as follows:

1. Whether Claimant has pneumoconiosis as defined by the Act and the regulations;

2. Whether Claimant's pneumoconiosis, if present, arose out of coal mine employment;

3. Whether Claimant is totally disabled; and

4. Whether Claimant's total disability, if present, is due to pneumoconiosis.

Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to the requirement that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §§ 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that a party is limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy and two medical reports as affirmative proof of their entitlement to benefits under the Act. §§ 725.414(a)(2)(i), 725.414(a)(3)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test or arterial blood gas study. §§ 725.414(a)(2)(ii), 725.414(a)(3)(ii). Likewise, the District Director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii).

In my previous Decision and Order, I completely and thoroughly summarized all the medical evidence of record. I adopt the descriptions of the evidence and will refer to it as necessary to resolve the entitlement issues. Accordingly, I incorporate by reference, as if fully set forth herein, the description of the medical evidence as contained in my June 22, 2004 Decision and Order.

Employer submitted medical opinion reports from Drs. Rosenberg, Repsher and Broudy. The Board found that Employer's submissions were in violation of the evidentiary limitations. On December 19, 2005, Employer withdrew the report and deposition of Dr. Repsher. (Employer Remand Brief p. 2). Employer now relies on the medical reports of Dr. Broudy (DX 29, 30) and Dr. Rosenberg (EX 1, 5 and 9).

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d)(2)(i-iv). Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989).

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: chest x-ray, biopsy or autopsy, presumption under §§ 718.304, 718.305 or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 C.F.R. § 718.202(a). The regulatory provisions at 20 C.F.R. § 718.201 contain a definition of "pneumoconiosis" provided as follows:

> (a) For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis.
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> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
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> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

§ 718.201(a).

It is within the administrative law judge's discretion to determine whether a physician's conclusions regarding pneumoconiosis are adequately supported by documentation. *Lucostic v. United States Steel Corp*., 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co*., 8 B.L.R. 1-262, 1-265 (1985).

A. X-ray Evidence

Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP,* 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

In my June 22, 2004 Decision and Order, I found Claimant failed to prove the existence of pneumoconiosis through x-ray evidence under § 781.202(a)(1). The Board affirmed this finding, and therefore, I stand by my prior finding that Claimant has failed to prove pneumoconiosis under § 718.202(a)(1).

B. Autopsy/Biopsy

Pursuant to Section 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

C. Presumptions

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

D. Medical Opinions

Section 718.202(a)(4) provides another way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion might support the presence of the disease if it is supported by adequate rationale, not withstanding a positive x-ray interpretation. *See Trumbo v.*

Reading Anthracite Co., 17 B.L.R. 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 9 B.L.R. 1-22, 1-24 (1986). The weight given to a medical opinion will be in proportion to its well-documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 B.L.R. 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Buffalo v. Director*, OWCP, 6 B.L.R. 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 B.L.R. 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*).

Glen R. Baker, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, opined Claimant has pneumoconiosis based solely upon his own readings of a chest x-ray and Claimant's history of dust exposure. (DX 9). In *Cornett v. Benham Coal Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute sound medical judgment under Section 718.202(a)(4). *Id.* at 576. The Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(*citing Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). In *Taylor*, the Board explained that the fact that a miner worked for a certain period of time in the coal mines alone does not tend to establish that he has any respiratory disease arising out of coal mine employment. *Taylor*, 8 B.L.R. at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray... and not a reasoned medical opinion." *Id*.

Acknowledging that Dr. Baker performed other physical and objective testing, he listed that he expressly relied on Claimant's positive x-ray and coal dust exposure for his clinical determination of pneumoconiosis. Moreover, he failed to state how the results from his other objective testing might have impacted his diagnosis of pneumoconiosis. As he does not indicate any other reasons for his diagnosis of pneumoconiosis beyond the x-ray and exposure history, I find his report with respect to a diagnosis of clinical pneumoconiosis is unreasoned.

In addition, Dr. Baker diagnosed Claimant with chronic obstructive pulmonary disease with moderate obstructive ventilatory defect based on pulmonary function testing and chronic bronchitis based on his history. However, Dr. Baker fails to opine Claimant's chronic bronchitis and chronic airway disease is related to coal dust exposure. Although Dr. Baker states within reasonable medical probability Claimant's disease is the result of coal dust exposure, he bases this reasoning on Claimant's chest x-ray revealing pneumoconiosis and does not attribute

Claimant's other illnesses to coal dust exposure. Therefore, his diagnoses do not constitute a finding of legal pneumoconiosis. (DX 9). I give Dr. Baker's opinion little weight.

The record also contains medical records from Dr. Baker. (CX 2, DX 23). These records consistently diagnose Claimant with pneumoconiosis and chronic obstructive pulmonary disease. However, the records do not indicate a basis or reasoning for the opinions. Therefore, I find the records unreasoned and give them little weight.

Imtiaz Hussain, M.D. also concluded Claimant suffers from pneumoconiosis. (DX 10). He examined Claimant on May 11, 2001. Dr. Hussain diagnosed Claimant with pneumoconiosis, chronic obstructive pulmonary disease and hypoxemia all related to coal dust exposure and tobacco use. He based his opinion on Claimant's multiple years of coal dust exposure, chest-ray, pulmonary function tests and hypoxemia. However, it is proper for an Administrative Law Judge to discredit a medical opinion based on an inaccurate length of coal mine employment. *Worhach v. Director, OWCP*, 17 B.L.R. 1-105 (1993)(per curiam). Dr. Hussain failed to conduct an employment history of Claimant altogether. Therefore, I give his opinion little probative weight.[1]

In contrast, Bruce Broudy, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, concluded Claimant does not have pneumoconiosis. (DX 29). Dr. Broudy examined Claimant on April 26, 2001. He diagnosed Claimant with moderate to severe chronic obstructive airway disease related to smoking. He based his finding of no pneumoconiosis on a negative chest x-ray and CT-scan. Dr. Broudy's opinions are consistent with the probative chest x-ray evidence of record. He further explained his findings in his February 14, 2002 deposition. (DX 30). Dr. Broudy reiterated that Claimant's condition is related to smoking and not coal mine employment. He testified that smoking is the common cause of obstructive airway disease but that coal dust exposure can also be a cause. However, he stated that when coal dust exposure causes an impairment "it's usually restrictive and when it's obstructive, it's usually just a mild impairment. When there's severe impairment, there's usually evidence of extensive pneumoconiosis by chest x-ray which is not the case at this time." (DX 30). I find Dr. Broudy's medical report is well-reasoned and well-documented regarding pneumoconiosis and I give it great weight.

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[1] The District Director is required to provide each miner applying for benefits with the "opportunity to undergo a complete pulmonary evaluation at no expense to the miner." § 725.406(a). A complete evaluation includes a report of the physical examination, a chest x-ray, a pulmonary function study, and an arterial blood gas study. Reviewing courts have added to this burden by requiring the pulmonary evaluation be sufficient to constitute an opportunity to substantiate a claim for benefits. *See Petry v. Director*, OWCP 14 B.L.R. 1-98, 1-100 (1990)(*en banc*); *see also Newman v. Director*, OWCP, 745 F.2d 1161 (8th Cir. 1984); *Prokes v. Mathews*, 559 F.2d 1057, 1063 (6th Cir. 1977).

In this Decision and Order, I have found that Claimant's complete pulmonary evaluation by Dr. Hussain should be given little probative weight for purposes of determining pneumoconiosis as noted above. However, the other evidence of record does not support a finding of pneumoconiosis by a preponderance of the evidence. As a result, even if this claim were remanded to the Director to provide a reasoned and documented opinion concerning the existence of pneumoconiosis, the Claimant could not prevail. Therefore, I find that remand of this case would be futile. *Larioni v. Director, OWCP*, 6 B.L.R. 1-1276 (1984); *see*, *e.g.*, *Mullins v. Director, OWCP*, No. 05-0295 BLA (BRB, Jul. 27, 2005)(unpub.); *Bowling v. Director, OWCP,* No. 05-0327 BLA (BRB, Jul. 29, 2005)(unpub.).

David M. Rosenberg, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, provided a consultative report on April 28, 2003. (EX 1). He then examined Claimant on July 30, 2003 and provided a report dated August 18, 2003. (EX 5). In both reports, Dr. Rosenberg opined that Claimant does not suffer from pneumoconiosis or any other coal dust related disease. Dr. Rosenberg bases his opinion on his own findings upon physical examination and review of the medical evidence. Dr. Rosenberg based his opinions on a more complete consideration of Claimant's current status regarding his smoking history and results on pulmonary testing and chest x-rays. Dr. Rosenberg stated that Claimant's total lung capacity was normal with no restriction and that his reduced diffusing capacity was related to smoking. He found no micronodularity associated with coal dust exposure on the chest x-ray. His opinions are consistent with the probative chest x-ray evidence of record. Dr. Rosenberg further explains his findings and reasoning in his September 13, 2003 deposition. (EX 9). I find Dr. Rosenberg's medical opinion well-reasoned and well-documented regarding pneumoconiosis and I give it great weight.

Accordingly, I find Claimant has failed to establish by a preponderance of the narrative medical evidence that he suffers from pneumoconiosis. Therefore, Claimant has failed to prove the existence of pneumoconiosis under Section 718.202(a)(4).

I have considered all the evidence under Section 718.202(a); and I find the probative negative x-ray reports and the more complete, comprehensive and better supported medical opinion reports of Drs. Broudy and Rosenberg outweigh the reports of Drs. Baker and Hussain, and the other contrary evidence of record. Thus, I find Claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis.

Causation of Pneumoconiosis

Once it is determined that a claimant suffers from pneumoconiosis, it must be determined whether the claimant's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). The burden is upon Claimant to demonstrate by a preponderance of the evidence that his/her pneumoconiosis arose out of his coal mine employment. 20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arouse out of such employment.

Id.

Since I have found that Claimant failed to prove that he has pneumoconiosis, the issue of whether pneumoconiosis arose out of his employment in the coal mines is moot.

Total Disability

The determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of Section 718.204. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). A claimant can be considered totally disabled if the irrebuttable presumption of Section 718.304 applies to his claim. If, as in this case, the irrebuttable presumption does not apply, a miner shall be considered totally disabled if in absence of contrary probative evidence, the evidence meets one of the Section 718.204(b)(2) standards for total disability. The regulation at Section 718.204(b)(2) provides the following criteria to be applied in determining total disability: 1) pulmonary function studies; 2) arterial blood gas tests; 3) a cor pulmonale diagnosis; and/or, 4) a well-reasoned and well-documented medical opinion concluding total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

A. Pulmonary Function Tests

Under Section 718.204(b)(2)(i), total disability may be established with qualifying pulmonary function tests.[2] To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited poor cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984). However, a non-conforming study may be entitled to probative weight where the results are non-qualifying. The Board has stated that a report's lack of cooperation and comprehension statements does not lessen the reliability of the study when it is non-qualifying. *Crapp v. U.S. Steel Corp.*, 6 B.L.R. 1-476 (1983).

[2]A qualifying pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A non-qualifying test produces results that exceed the table values.

In the pulmonary function tests of record, there is a small discrepancy in the height attributed to Claimant. The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). In analyzing the pulmonary function test results, I shall utilize the average height reported for Claimant, 67.6 inches.

Only two pulmonary function tests of record conform to the application quality standards and they both produced qualifying results.[3] (DX 10, EX 5). Accordingly, I find per Section 178.204(b)(2)(i), Claimant has established total disability.

B. Blood Gas Studies

Under Section 718.204(b)(2)(ii) total disability may be established with qualifying arterial blood gas studies. All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner or circumstances surrounding the testing affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated).

There are four arterial blood gas studies noted in the record. Only the test conducted by Dr. Baker produced qualifying values. However, while the test results are noted in Dr. Baker's report the test is not included in the record. Therefore, the test cannot be taken into consideration. Accordingly, I find Claimant has not proven total disability under Section 718.204(b)(2)(ii).

C. Cor Pulmonale

There is no medical evidence of cor pulmonale in the record, I find Claimant failed to establish total disability with medical evidence of cor pulmonale under the provisions of Section 718.204(b)(2)(iii).

D. Medical Opinions

The final way to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2) is with a reasoned medical opinion. The opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. *Id*. A claimant must demonstrate that his respiratory or pulmonary condition prevents him from engaging in his "usual" coal mine employment or comparable and gainful employment.
20 C.F.R. § 718.204(b)(2)(iv).

[3] The pulmonary function tests at DX 9, DX 23, DX 29 and CX 2 all failed to indicate Claimant's cooperation and effort levels, and therefore, they fail to conform to regulation requirements and will not be taken into consideration.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. In assessing total disability under Section 718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by claimant's respiratory impairment sufficiently for administrative law judge to infer that claimant is totally disabled). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform comparable and gainful work pursuant to Section 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

The physicians' reports are summarized in my June 22, 2004 Decision and Order. In summary, Dr. Baker reported that Claimant worked in underground coal mine employment for thirty-six years. (DX 9). Dr. Baker opined that Claimant has a Class III impairment based on the FEV_1 readings being between forty and fifty-nine percent of the predicted values. He based this analysis on Table 5-12 on page 107 of *Guides to Evaluation of Permanent Impairment, Fifth Edition*. He also found that Claimant has an impairment based on Section 5.8 of *Guides to Evaluation of Permanent Impairment, Fifth Edition*, which he notes states "that persons who develop pneumoconiosis should limit further exposure to the offending agent." Dr. Baker finds that the article implies Claimant is totally disabled from working in coal mine employment. (DX 9). However, an opinion of the inadvisability of returning to coal mine employment because of pneumoconiosis is not the equivalent of a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.,* 12 BLR 1-83 (1988); *Taylor v. Evans & Gambrel Co.,* 12 B.L.R. 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988); *Bentley v. Director, OWCP*, 7 B.L.R. 1-612 (1984); *Brusetto v. Kaiser Steel Corp.,* 7 B.L.R. 1-422 (1984). Therefore, Dr. Baker has not accurately addressed whether Claimant's condition prevents him from engaging in his usual coal mine employment or comparable gainful employment under standards mandated by the present Act, but instead has simply recommended that Claimant not engage in these activities. Also, his documentation of limitations on Claimant's residual exertional capacity necessary to perform his duties as a coal miner is virtually non-existent. As a result, despite his qualifications as an internist and pulmonologist, I find that Dr. Baker's conclusion of total disability does not constitute a reasoned and documented medical opinion and I give it little probative weight.

Dr. Hussain opined Claimant has a severe pulmonary impairment which prevents him from having the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. He based his opinion on Claimant's symptoms of dyspnea and wheezing. Also the pulmonary function testing performed by Dr. Hussain produced qualifying results. However, Dr. Hussain failed to take an employment history of Claimant. Also his documentation of limitations on Claimant's residual exertional capacity necessary to perform his duties as a coal miner is non-existent. Therefore, I assign little probative weight to Dr. Hussain's opinion regarding total disability.[4]

[4] As previously stated, I have found that Claimant's complete pulmonary evaluation by Dr. Hussain should be given little probative weight for purposes of determining total disability. However, the other evidence of record does

Dr. Broudy noted Claimant had a history of thirty-five years in underground coal mine employment as a shuttle car operator and mechanic. (DX 29). He found that Claimant's spirometry revealed a moderately severe obstruction. He noted a slight improvement after using the bronchodilator. He also diagnosed Claimant with mild to moderate hypoxemia with borderline hypercarbia. Dr. Broudy opines that Claimant does not retain the respiratory capacity to perform the work of a coal miner. He based his opinion on Claimant's chronic obstructive airway disease which he relates to Claimant's smoking history. (DX 29). Dr. Broudy's finding of total disability is supported by the probative objective testing of record. Dr. Broudy further explained his findings and opinions in his deposition dated February 14, 2002. (DX 30). I find Dr. Broudy's medical report regarding total disability well-reasoned and well-documented and I give it great weight.

Dr. Rosenberg opines Claimant is totally disabled. (EX 1, 5). He found Claimant worked thirty-nine years in coal mine employment. Dr. Rosenberg noted Claimant had a normal total lung capacity with no restriction. However he found a reduced diffusing capacity related to smoking. He opined from a functional standpoint that Claimant has severe airflow obstruction which is totally disabling. Dr. Rosenberg stated that Claimant's disability prevents him from being able to perform his previous coal mine employment. He based his opinion on the severe airflow obstruction and bronchodilator response. Dr. Rosenberg's opinion is supported by the probative pulmonary function testing of record. Dr. Rosenberg further explained his findings and opinions in his deposition dated September 13, 2003. (EX 9). I find Dr. Rosenberg's medical report well-reasoned and well-documented regarding total disability and grant it great weight.

The record contains four medical reports all finding total disability. Two opinions were granted little probative weight and the others were granted great weight. A claimant must prove by a preponderance of the evidence total disability. Since there are no opinions finding Claimant is not totally disabled, Claimant has met his burden of proof. Therefore, I find Claimant has established total disability by the probative medical opinion reports of record under the provisions of Subsection 718.204(b)(2)(iv).

E. Overall Total Disability Finding

Upon consideration of all of the evidence of record, Claimant has established, by a preponderance of the evidence, total disability. Accordingly, I find Claimant has established total disability under the provisions of Section 718.204(b).

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support a finding of total disability. As a result, it would be futile to remand the claim to the Director to provide a reasoned and documented opinion concerning the existence of total disability. *Larioni v. Director, OWCP*, 6 B.L.R. 1-1276 (1984); *see*, *e.g.*, *Mullins v. Director, OWCP*, No. 05-0295 BLA (BRB, Jul. 27, 2005)(unpub.); *Bowling v. Director, OWCP,* No. 05-0327 BLA (BRB, Jul. 29, 2005)(unpub.).

Total Disability Due to Pneumoconiosis

Although Claimant established total disability, Claimant is nonetheless ineligible for benefits because he fails to show total disability due to pneumoconiosis as demonstrated by documented and reasoned medical reports. *See* § 718.204(c)(2). In interpreting this requirement, the Sixth Circuit has stated that pneumoconiosis must be more than a *de minimus* or infinitesimal contribution to the miner's total disability. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 506-507 (6th Cir. 1997). There are no well-reasoned and well-documented reports of record regarding total disability due to pneumoconiosis. Although, the reports of Drs. Broudy and Rosenberg were well-documented and well-reasoned as to total disability, they attributed Claimant's condition to smoking and not coal mine employment. Dr. Baker's report regarding pneumoconiosis and total disability was unreasoned. Moreover, Dr. Hussain's pneumoconiosis and total disability opinions were granted little probative weight. Therefore, I find that Claimant has failed to establish total disability due to pneumoconiosis.

ENTITLEMENT

Based on the findings in this case, Claimant has not met the conditions of entitlement. Claimant has not established the presence of pneumoconiosis, that such pneumoconiosis arose out of coal mine employment or that he is totally disabled due to pneumoconiosis. Therefore, Mr. Coots' claim for benefits under the Act shall be denied.

Attorney's Fees

The award of attorney's fees, under this Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim

ORDER

It is ordered that the claim of Carlos Coots for benefits under the Black Lung Benefits Act is hereby DENIED.

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JOSEPH E. KANE
Administrative Law Judge

Notice of Appeal Rights: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with Board within thirty (30) days from the date of which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* C.F.R §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).